IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 172 OF 2005

SHRI VINAYAK SITARAM GAUNSO AND 12 ORS., ... Appellants

Versus

SMT. EMA JUDITH EMERICO NORONHA(DEC) THROUGH L.RS.AND 6 ORS., ... Respondents

Mr. M.B. D'Costa, Sr. Advocate with Mr. J. A. Lobo, for the Appellants.

Mr. J.E. Coelho Pereira, Sr. Advocate with Mr. S. Karpe, For Resp. No. 1(e,f,h,i,l,m,p,q)

Coram:- S.A.BOBDE, J.

Date:- 29th March, 2007

ORAL ORDER:

This is defendant's second appeal against the Judgment of the first Appellate Court, decreeing the plaintiff's suit for injunction. The trial Court had dismissed the plaintiff's suit.

2. Mr. D'Costa, the learned counsel for the appellants submitted that the Judgment of the first Appellate Court is not in accordance with law, since the lower Appellate Court has granted injunction inspite of the fact that the defendants have been found to be in possession of the suit property.

3. On a closer scrutiny of the Judgment of the lower Appellate Court, it is clear that the lower appellate Court has come to a specific conclusion vide paragraph 24 that the plaintiff is in lawful possession of the suit property. The lower Appellate Court has also held that the plaintiff has a title to the property. In paragraph 28 of the Judgment, the first Appellate Court has specifically considered the submission, now made before me,

and has held that the claim of the defendants that they are in possession because it is admitted that they used to cultivate vegetables on the land is not tenable since the defendant's witnesses have stated that vegetables were grown only during the monsoon season and that this too was done only in two seasons. The appellate Court has specifically held that the defendants have failed to prove that they were in possession of the suit property prior 1990 and that the cultivation of vegetables in two monsoons are stray incidents of trespass over the suit property, which does not lead to the inference that the defendants are in possession of the suit property. There is therefore no merit in the first submission on behalf of the appellants which in any case is a ground pertaining to a pure question of fact i.e. who is in possession.

4. The next submission raised on behalf of the appellants is that P.W.1 was a power of attorney holder of the plaintiff i.e. Mr. Judith Emerico Noronha and therefore he could not have given evidence on behalf of the plaintiff in view of the observations of the Supreme Court in Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd. and others reported in (2005) 2 SCC 217. The said observations read as follows :-

" 13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order 3 Rules 1 and 2 CPC confines only to in respect of "acts" done by the power-of-attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined. "

5. I am of view that these observations do not apply to the present case and to the evidence given by P.W.1: for two reasons:-

Firstly, because the plaintiff Ema Judith Emerico Noronha is the mother of the witness and the witness is a co-owner of the property in respect of which the suit is brought. Thus what is assailed is the evidence of a co-owner on the ground that he has been constituted as a power-of-attorney by the mother who is the plaintiff.

Secondly, this witness has deposed from personal knowledge regarding the encroachment of the appellants. The subject of his deposition is thus not a matter of which only the principal can have personal knowledge and in respect of which the principal is liable to be cross-examined. Thus this aspect also does not give rise to substantial question of law in this case.

6. In this view of the matter, I find that the appeal does not raise any substantial question of law and is hereby dismissed.

S.A.BOBDE, J.

sl.